IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

(1) D.B.CRIMINAL MURDER REFERENCE NO.3/2006
(State of Rajasthan vs. Munna Shah)

(2) D.B.CRIMINAL APPEAL NO.607/2006
(Munna Shah Vs. State of Rajasthan)

(3) D.B.CRIMINAL JAIL APPEAL NO.608/2006
(Munna Shah Vs. State of Rajasthan)

(4) D.B.CRIMINAL APPEAL NO.638/2006
(Munna @ Dilip Vs. State of Rajasthan)

(5) D.B.CRIMINAL APPEAL NO.639/2006
(Raju Yadav @ Iqbal Ahemad Vs. State of Rajasthan)

(6) D.B.CRIMINAL LEAVE TO APPEAL NO.270/2006
(State of Rajasthan Vs. Kalu Ram @ Kalu Lal)

Date of Judgment: October 19th, 2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

REPORTABLE/-

Mr.J.P.S.Choudhary,Public Prosecutor

Mr.G.M.Khan, Mr.M.S.Chouhan, Mr.A.K.Sindhi, Mr.A.R.Malkani, Mr.Sakir Ali, Mr.Sikander Khan, Mr.Sahadat Ali, Mr.Mridul Jain, Smt.Anuradha Jain, Mr.R.S.Chouhan, Mr.Anuj Sahlot, Mr.K.C.Sharma, Mr.B.S.Rathore, Mr.K.S.Chouhan for respective appellants/party

Mr.Ramesh Purohit, for the complainant

BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. The instant murder reference for confirmation of death sentence and batch of appeals arises out of a tragic incident as a result of conspiracy for robbery. The appellants A-1 Munna Shah S/o Mubarak Shah resident of Ziraniya, State of Madhya Pradesh, A-2 Raju Yadav @ Iqbal S/o Sultan Ahmed Kureshi resident of Sahapur (M.P.), A-3 Munna @ Dilip S/o Mangilal resident of Sahapur(M.P.) and Kalu Ram @ Kalu Lal were sent up for trial on charge of robbery and murder before the court of Additional Sessions Judge (Fast Track), Pratapgarh. The learned Judge by the impugned judgment dated 21st June, 2006 having found the appellant A-1 Munna Shah guilty of offence under Section 302 I.P.C. condemned to death. He has also been convicted and sentenced for cognate offences. The appellant A-2 Raju Yadav @ Iqbal and A-3 Munna @ Dilip have been convicted of offence under Section 302/120-B I.P.C. and each of them sentenced to imprisonment for life and to pay a fine of Rs.1000/-; in default of payment to further undergo one year's rigorous imprisonment. They have also been convicted and sentenced for the cognate offences. The learned

Additional Sessions Judge has made the statutory reference under Section 366(1) of the Code of Criminal Procedure for the confirmation of death sentence. While all the three appellants A-1 Munna Shah, A-2 Raju Yadav @ Iqbal and A-3 Munna @ Dilip have preferred appeal against their conviction, the State has preferred an appeal against part of the judgment acquitting accused respondent Kalu Ram @ Kalu Lal.

2. The factual score as emerged during the trial is that appellant A-3 Munna @ Dilip resident of Sahapur was married at Pratapgarh the place of occurrence. A-2 Raju Yadav @ Iqbal is also resident of Sahapur, State of Madhya Pradesh. They are said to be friends. A-3 Munna @ Dilip settled in Pratapgarh. He used to sell vegetables on a Thela on the Bus Stand of the Town. Kalu Ram is also a vegetable seller running a Thela at the Bus Stand. A-2 Raju Yadav @ Iqbal was arrested in connection with a theft case. He was detained in Jail at Pratapgarh. He came in contact with A-3 Munna alias Dilip. A-1 Munna Shah was also known to A-2 Raju Yadav @ Iqbal. It was in the knowledge of both the vegetable sellers that Petrol Pump owners used to visit Bank for depositing the huge amount. Thus, the accused

persons hatched a plan of committing the robbery. A-1 Munna Shah assured for arranging the necessary weapons like pistol. A-1 Munna Shah and A-2 Raju Yadav @ Iqbal arrived at Pratapgarh on 7.10.2003. It is alleged that they stayed in Room No.1 of Ambika Hotel during the period 7.10.2003 to 15.10.2003. A-3 Munna @ Dilip and Kalu Ram @ Kalu Lal were regular visitors. They also used to talk secretly. It is further alleged that they used to keep watch on the persons of the Petrol Pump visiting the Bank for depositing the amount. The Branch of the Rajasthan Bank is situated on the First Floor of the building on the Bus Stand in Pratapgarh Town.

3. On 15.10.2003 at about 10.15 A.M. P.W.1 Rakesh left the Petrol Pump on a Scooter carrying an amount of Rs.8,46,850/- in a Bag. He parked the Scooter in front of the Bank. He reached on the First Floor and passed through the channel gate. Abruptly a person arrived from back and asked him to release the bag of currency notes. When he turned round the said person pointed pistol at him. He became panicky but refused to pass on the Bag, on which he fired pistol, hitting on his chest and snatched away the bag. He ran down with the bag

and boarded the awaiting Motor-Cycle parked on the road in motion mode with another miscreant occupying the driving seat. The third miscreant was standing nearby. He also came down. The gun shot fire and his cries attracted the employees and others on the sport. The miscreant with bag in hand shouted, asking the third miscreant calling by name **"Dilip"** to run away, on job being accomplished. One labourer namely Mahesh, standing nearby nabbed the miscreant (who had fired) and threw him on the ground. Meanwhile the other two miscreants speed up motor-cycle and ran away. The miscreant, who had fallen on the ground soon stood up and fired at Mahesh and took his heels towards Krishi Upaj Mandi with the bag of currency notes in hand. Mahesh fell down. P.W.13 Mukesh, P.W.20 Tej Singh took Rakesh to the hospital on the scooter. The police received a telephonic information, after making entry in the Rojnamcha at 10.22 A.M. rushed to the spot. The police flashed the news of the incident on wireless to all concern and arranged blockade on all roads providing way to move out of Town. P.W.27 Vikram Singh, S.H.O., Police Station, Pratapgarh went to the hospital and recorded the statement of Rakesh Paliwal. On the basis of the Parcha

Bayan Ex.P1, Police registered a F.I.R. For offence under Sections 307, 397, 398, 302, 120-B I.P.C. and 3/25 of the Arms Act. The police inspected the site and recovered the incriminating articles particularly empty cartridge and bullet. The appellant A-1 Munna Shah was arrested red handed with pistol and the bag of currency notes. On inspection of the pistol a burnt and a live cartridge was found, which were separately sealed and packed. Mahesh Gwala collapsed on the spot. His body was sent for post-mortem. Police also seized the Visitors Register from the Ambika Hotel. The motor vehicle used in the crime found abandoned was also seized. On the same day the appellant Kalu Lal was also arrested. From his possession the clothes of the appellant Munna Shah were recovered. A police team was dispatched to State of Madhya Pradesh for the arrest of two other accused persons i.e. Raju Yadav @ Iqbal and Munna @ Dilip. P.W.15 Bheru Singh A.S.I. arrested appellants Raju Yadav @ Iqbal and Munna @ Dilip vide Ex.P16 and Ex.P17 respectively from village Sahapur, State of Madhya Pradesh on 22.10.2003. Both of them were brought to Pratapgarh. On 3.11.2003 the identification parade was arranged. Police also recovered currency notes from the possession of Raju

Yadav @ Iqbal. After usual investigation police laid charge-sheet against the appellants for offence under Sections 120-B, 397, 398, 307 & 302 I.P.C. read with Section 3/25 of the Arms Act. The appellants denied the charges levelled against them and claimed trial. The prosecution in support of the case produced oral and documentary evidence. The appellants in their statement under Section 313 of the Code of Criminal Procedure denied the correctness of the prosecution evidence appearing against them and pleaded innocence. The trial culminated in conviction of the appellants by the impugned judgment as indicated above. The accused appellant Kalu Ram @ Kalu Lal was acquitted of the charge.

4. It is not in dispute that Mahesh Gwala died of homicidal death. P.W.5 Dr.Manmal Sankhla was one of the member of the Medical Board, which conducted autopsy on the dead body of deceased Mahesh Gwala and noticed the following ante mortem injuries vide post-mortem report Ex.P13:-

> Gun shot wound of entry of size 5 cm x 2 cm present on left side of forehead with charring of surrounding tissue and hair scorched with bone punctured out & brain matter coming out through the wound.

In opinion of the Medical Board the cause of death was due to coma as a result of Neurogenic shock due to gun shot injury.

5. P.W.5 Dr.Manmal Sanklha has also examined the injuries on the person of P.W.1 Rakesh vide Report Ex.P/4 noticing the following injury:-

> Lacerated wound with charring of surroundings of 3 x 2 x 2 cm bone deep with bleeding.

6. We have heard the learned Public Mr.J.P.S.Choudhary assisted by the counsel for the complainant Mr.Ramesh Purohit in support of the murder reference. We have also heard Mr.G.M.Khan learned counsel for appellant Munna Shah, Mr.B.S.Rathore learned counsel for appellant Raju Yadav @ Iqbal and Mr.Mridul Jain learned counsel for appellant Munna @ Dilip. We have also perused the record carefully. It is submitted that the trial court has committed error in convicting the appellants for offence of conspiracy under Section 120-B I.P.C. According to the learned counsel for the parties the finding with respect to conspiracy is based on surmises and

conjectures. There is no evidence worth the name that the alleged incident is outcome of the conspiracy. As regards the main incident it is submitted that the entire case rests on the evidence of identification. Except Munna Shah none of the witnesses have identified the appellant Raju Yadav @ Iqbal in the test identification parade. As far as Munna @ Dilip is concerned, he was not put to identification. The conviction of the appellants on the basis of the court identification is not sustainable. On the other hand, it is submitted by the learned Public Prosecutor that there are reasonable grounds to believe the existence of conspiracy between the accused persons of committing the robbery and murder. The finding recorded by the trial court is based on sound reasons, which warrants no interference. The learned Public Prosecutor has supported the judgment of the trial court and murder reference.

7. Before we avert to the rival contentions, it would be convenient to briefly survey the oral evidence produced by the prosecution. P.W.1 Rakesh is the partner of M/s Purshottamlal Rameshchandra firm running a petrol pump at Pratapgarh. He deposed that on the date of occurrence he arrived at the Rajasthan

Bank situated on the Bus Stand of Pratapgarh for depositing an amount of Rs.8,46,850/-. He carried the currency notes in a bag. He parked the Scooter and entered in the Bank Building. On reaching First Floor, some body from behind asked him to hand over the bag of currency notes to him. He identified the said person as appellant Munna Shah. On his refusal to part with the bag, Munna Shah fired at him, hitting on the chest. He snatched the bag, rushed down and boarded the awaiting Motor Cycle parked on the road in motion mode with other miscreant on the driving seat, identified as Raju Yadav alias Iqbal. Munna Shah shouted at third miscreant calling by name **"Dilip"** to run away on job being accomplished. However, a labour named Mahesh standing nearby, swoop on him and threw on the ground. Appellant Munna Shah quickly got up and fired the pistol, hitting deceased Mahesh, on account of which he fell down. Both the miscreants i.e. Raju alias Iqbal and Munna alias Dilip, speed up the Motorcycle and disappeared. Munna Shah pointing pistol at the mob ran towards the Krishi Upaj Mandi. Number of people had collected on the place of incident, which included employees of the Bank, Vidhya Sagar Rathore, Ishwarlal etc. The police recorded his statement vide

Ex.P1 while he was in hospital.

8. P.W.12 Champaji deposed that at the time of occurrence he was on his shop near Archna Talkies. He witnessed mob chasing a person carrying bag and pistol in hand. The man was rounded up and handed over to the police. The police prepared necessary memos in his presence.

9. P.W.13 Mukesh deposed that P.W.1 Rakesh was known to him. On the date of occurrence he had seen Rakesh proceeding towards the Rajasthan Bank with a bag in hand. He heard of a gun shot fire. He witnessed the person carrying revolver in his hand. He was also carrying a bag. He heard of Rakesh Paliwal shouting. A motorcycle was parked in motion mode on the road. The man with revolver and bag in hand occupied the seat on the motorcycle. Mahesh Gwala grabbed and threw him on the road. However, he got up and fired the pistol hitting Mahesh on the head. He shouted at one of the person standing naming Dilip and asked him to went off as the job has been accomplished. Dilip and the other person drove out on the motorcycle. The person with the bag in hand and pistol ran towards the Krishi Upaj

Mandi. The mob chased him. He along with others took Rakesh to the hospital and soon returned to the Bus Stand. The police had arrived on the spot. He is Motbir of the different police memos. He identified the appellant Munna Shah present in the court as a person carrying the bag and fired at Mahesh. He also identified the appellant Iqbal as the person, occupying the driving seat of the motorcycle.

10. P.W.18 Ishwarlal runs a STD shop in front of Archna Talkies. He deposed that P.W.1 Rakesh Paliwal was known to him. On the date of occurrence at about 10 A.M. When he reached near the Bank, he heard of gun fire. One person came out of the Bank with a pistol and bag in hand. He was followed by Rakesh Paliwal. His hand was on the chest and shouting that he was being shot. He was also shouting to the effect that a miscreant, after snatching his bag full of currency notes has escaped. He also witnessed a motorcycle parked outside the Bank in motion mode. He further deposed that when person with pistol and bag in hand tried to occupy the motorcycle, Mahesh Gwala nabbed him and threw on the road. He soon got up and fired the pistol hitting the head of Mahesh. The person on the

motorcycle asked his companion calling him by name as Dilip to move fast as the job has been accomplished. Both the persons went off on the motorcycle. Mahesh fell down and collapsed. The miscreant ran towards Krishi Upaj Mandi with bag and pistol in hand. Rakesh Paliwal was taken to the hospital by Mukesh on the scooter. One Teju also accompanied him. The police reached on the spot. He identified the appellant Munna Shah as the person running with the pistol and bag in the hand. He also identified the appellant Iqbal as the person sitting on the motorcycle. He also identified Munna @ Dilip. He also stated that he had identified the appellant Munna Shah in the identification parade. P.W.20 Tej Singh has not supported the prosecution case, as such he was declared hostile.

11. P.W.14 Prabhulal is the Proprietor of Petrol Pump M/s Purshottamlal and Rameshchandra. He had the Bank account of the Firm with Rajasthan Bank on Krishi Upaj Mandi Road near Archna Talkies. On 15.10.2003 at about 10 A.M. his younger brother P.W.1 Rakesh Paliwal carried Rs.8,46,850/- for depositing the same in the Bank. After about 10 minutes he received an information on telephone that some miscreant causing

injuries to Rakesh has taken away the bag. Rakesh was taken to the hospital. He rushed to the hospital. P.W.1 Rakesh narrated the entire incident to him.

12. P.W.16 Gopal Singh at the relevant time was Manager of Ambika Hotel at Pratapgarh. He deposed that on 6.9.2003 Raju Yadav and Munna Shah arrived at the hotel. They made entries in the visitors' register. They stayed in the hotel during period 7.10.2003 to 15.10.2003. Kalu Lal Gujar and Dilip were the regular visitors. Both of them visited the hotel in the evening of 14.10.2003 and inquired about Munna Shah and Raju Yadav. Both of them went to Room No.1, where Munna Shah and Raju Yadav were staying. He overheard talking them about a petrol pump. On 15.10.2003 Raju Yadav and Munna Shah left the hotel at about 9.30 A.M. He heard about robbery and murder in front of Rajasthan Bank. Raju Yadav and Munna Shah did not return to the hotel. He also stated that he identified the accused persons in the identification parade. He also stated that the Visitors Register was seized by the police. In the cross examination, he admitted that Kalu Gujar used to regularly bring vegetables to Hotel Ambika. He had also seen Dilip in the market selling

vegetables on a Thela.

13. P.W.19 Kailash was Waiter at the relevant time in Hotel Ambika. He deposed that Munna Shah and Raju Yadav had lodged in Ambika Hotel Room No.1 for about a week. He used to supply them breakfast, tea, water etc. in the room. A day before the date of occurrence Kalu and Dilip had come to meet Munna Shah and Raju Yadav at about 7.30 P.M. Munna Shah and Raju Yadav left the hotel on the date of occurrence at about 9.30 A.M. He had heard about the firing outside the Bank. Munna Shah and Raju Yadav did not return to the hotel after the said incident. He identified all the four accused persons in the court.

14. P.W.25 Ashok Kumar Tak was posted as Judicial Magistrate Pratapgarh at the relevant time. He deposed that in his presence the identification parade was held vide Ex.P7. He also deposed that he conducted the identification parade following all the precautions in accordance with law.

15. P.W.7 Vasudeo is the Photographer. P.W.8 Manoj deposed that he has done the videography of the place

of occurrence. P.W.17 Yam Subrahmanyam Sharma deposed that at the relevant time he was Executive Manager in B.T.S. Cellcom Ltd. The police approached to him with a Mobile bearing No.98226271154. The police wanted to get the details of all the calls of the said Mobile. He took out the details from the computer for the period 1.7.2003 to 16.10.2003. The details were given vide Ex.P62, P63, & P64. P.W.23 Gopesh Bhatt deposed that on the request of the police he had given the print out of the details of the Mobile.

16. P.W.9 Babu Lal is a formal police witness. P.W.11 Ram Singh and P.W.22 Dinesh Chandra are the police witnesses of the link evidence. P.W.24 Mithu Singh is the Armour. He deposed that he has examined the country made pistol recovered by the police. P.W.26 Shri Krishna Devendra Singh is the Sub Inspector at the Police Station, Pratapgarh. He deposed that on a report being brought by P.W.9 Babu Lal he registered the case. P.W.15 Bheru Singh is A.s.I. He has given the details of the arrest of the accused Munna @ Dilip and Raju Yadav @ Iqbal. P.W.27 Vikram Singh is the Investigating Officer. He has given the details of the investigation. P.W.2 Keshar Singh, P.w.3 Mohd.Rafiq, P.W.4 Dinesh,

P.W.10 Oonkar Lal are the formal witnesses of different police memos.

17. The defence has also examined three witnesses D.W.1 Mahesh Saxena, D.W.2 Afjal Ahmed Kureshi and D.W.3 Waqtawar. D.W.1 Mahesh Saxena deposed that appellant Dilip was known to him as he had married at Pratapgarh. He used to sell vegetables on a Thela like him. He left his house on 15.10.2003 and thereafter he was not seen. He came to know from News Papers namely Dainik Bhaskar and Nav Bharat that Dilip was involved in a shooting and robbery case. The photographs of the miscreants, which included Dilip had appeared in the News Papaers.

18. D.W.2 Afjal Ahmed Kureshi is the brother of appellant Iqbal. He has given the details of the family. His father retired from government service as Librarian. He had done his M.A. in Political Science. He gave details of all the brothers and sisters to show that the appellant Raju alias Iqbal belonged to a cultured and educated family. As regards appellant Iqbal he stated that while he was students of Second Year he left the studies. He also stated that Iqbal has no other bye-name like Raju Yadav. He has produced the school

certificate to show that his name is Iqbal. He also stated that on 15.10.2003 the appellant Iqbal was at his residence. D.W.3 Waqtawar deposed that no recovery was made in his presence in pursuance of the information given by appellant Kalu Ram.

19. While narrating the prosecution case, we have noticed inter se relationship of all the four accused persons. To put in capsule Raju Yadav @ Iqbal and Munna @ Dilip are the close friends being the resident of the same locality in Village Sahapur in State of Madhya Pradesh. Munna @ Dilip after marriage settled in Pratapgarh as a Fruit Seller. Kalu Gujar is also a Fruit Seller. Both of them were in know of the fact that huge sum is brought from Petrol Pump for depositing in the Bank. Raju Yadav @ Iqbal and Munna @ Dilip were arrested in connection with a theft case which refresh their alliance. They also came in contact with Munna Shah. A-1 Munna Shah along with A-2 Iqbal arrived at Pratapgarh and lodged in Ambika Hotel. Iqbal in order to conceal his identity introduced himself as Raju Yadav. An entry was made in the Visitors Register with such name. With the help of local people like Munna @ Dilip and Kalu they hatched a plan to commit robbery

and in event of resistance to kill such person for which A-1 Munna Shah carried country made pistol with him.

20. It is of course true that there is no direct evidence of conspiracy but it has to be borne in mind that a conspiracy from its very nature is generally hatched in secret as such it is extremely rare that direct evidence in proof of conspiracy can be brought but like other offences criminal conspiracy can be proved by circumstantial evidence. The Apex Court in **Noor Mohammad Mohd.Yusuf Momin vs. The State of Maharashtra** reported in AIR 1971 SC 885 noticing the difficulties of collecting evidence of conspiracy laid down that **once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offence committed pursuant thereto**.

21. In Noor Mohammad's case(supra) Dua J. pointed out the border areas of Section34, Section 109 and Section 120-B I.P.C. as follows:-

> "So far as S.34, Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application."

Dealing with Section 109, Indian Penal Code the Court observed,

> "Section 109, Indian Penal Code on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission."

Turning to Section 120-B I.P.C. the Court observed,

> "Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement."

21. In the instant case the prosecution in order to prove the charge of conspiracy has produced P.W.16 Gopal Singh and P.W.19 Kailash. We have already referred the evidence of both the witnesses. As per the

statement of P.W.16 Gopal Singh, A-1 Munna Shah and A-2 Raju Yadav @ Iqbal arrived in his hotel on 6.9.2003. Iqbal introduced himself as Raju Yadav and made entry in the Visitors Register in the name of Raju Yadav. The Register has been produced as Ex.P52. At Page 28 there is an entry in the name of Raju Yadav S/o Ashok Yadav aged 22 years, resident of Indore. Again an entry was made on 9.10.2003. All the entries were made in the name of Raju Yadav. It is also stated that the two persons had stayed in Room No.1 of his Hotel. Munna Shah has been identified by this witness in the test identification parade Ex.P7 as well as in the court. Raju Yadav @ Iqbal has been identified by him in court. However, it will not make any difference as Raju Yadav had stayed in his Hotel during the period 6.10.2003 to 15.10.2003. As such he had sufficient opportunity to interact with him. It is held by the Supreme Court in **Ronny Alias Ronald James Alwaris & Ors. vs. State of Maharashtra** reported in 1998(3) SCC 625 in Para 23 that **If the witness had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony in court and that the absence of corroborative evidence by way of test**

identification parade would not be material. He also stated that Dilip and Kalu Lal also used to visit them. P.W.19 Kailash was Waiter of the Hotel at the relevant time. He stated that the appellant Munna Shah and Raju Yadav @ Iqbal present in court had stayed in Ambika Hotel for about a week in Room No.1. He used to serve them breakfast, tea and water in the room. The appellants A-1 Munna Shah and A-2 Raju Yadav have not given any reason for their cause of visit to Pratapgarh. The alleged incident took place on 15.10.2003 at about 10 A.M. It is stated by both the witnesses that they left the Hotel by 9.30 A.M. And thereafter they did not return. A-1 Munna Shah was arrested red handed with the pistol and huge sum referred to above bearing the seal of the Petrol Pump M/s Purshottamlal and Rameshchandra. As per the statement of P.W.9 Babu Lal Raju Yadav @ Iqbal and Munna @ Dilip were arrested vide Ex.P16 & P17 respectively from the same Village i.e. Sahapur on 22.10.2003. Thus, it is evident that both the accused persons were living together. At this stage it would also be relevant to refer to the statement of D.w.2 Afjal Ahmed Kureshi. He identified the accused Raju Yadav as his younger brother named Iqbal. He also stated that he

does not have any bye-name. He has also produced the Admission Card Ex.D5 and Identity Card Ex.D6 issued by the School. He has also produced Ration Card and other certificates to show that the accused present in court is his brother named Iqbal R/o Sahapur. Thus, there is no dispute that A-2 Raju Yadav, who entered his name as Raju Yadav in the Visitors Register of Ambika Hotel is in fact Iqbal. The previous and subsequent conduct and other factors referred to above constitutes relevant mater suggesting a reasonable ground to believe that two accused A-1 Munna Shah, A-2 Raju Yadav @ Iqbal hatched plan of committing robbery.

22. Before we avert to analyse the evidence as indicated above, it would be desirable to acquaint with the relevant law concerning the identification. The learned counsel for all the three accused persons have mostly addressed as to the identification of the accused appellant, obviously because the entire case as to the participation of the accused persons is based on identity.

23. Chapter-II of the Indian Evidence Act deals with

the **relevancy of facts**. Section 7 deals with the admissibility of fact which are the occasion, cause or effect of facts in issue. Section 8, similarly make admissible facts showing motive or preparation for any fact in issue or relevant fact. Section 9 makes admissible facts, which are necessary to explain or introduce relevant facts, such as place, name, date, **identity of parties**, circumstances and relations of the parties. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused person at his trial. In all criminal cases, two important points are required to be decided i.e. Commission of the alleged offence, and if so, who committed the same. One of the method of establishing the identity of the accused is **"Test Identification Parade"**. The idea of parade is to test the veracity of the witness on the question of his capability of identifying, from several persons made to stand in queue and an unknown person, who the witness had seen at the time of occurrence. The test identification is required to furnish evidence to corroborate with the evidence of the witness concerned tendered in court. It is considered safe rule of prudence to generally look for

corroboration of the sworn testimony of witness in court as to the identity of the accused, who are strangers to them in the form of earlier identification parade. It falls in the realm of investigation. The substantive evidence is the statement of the witness made in the court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such a piece of evidence. In **Budhsen vs. state of U.P.** reported in AIR 1970 SC 1321 the Apex Court observed that the witness had only a mere fleeting glimpse and for identification one would certainly expect more firm and positive reference. A Three Judges Bench of the Apex Court in **Rameshwar Singh vs. State of J & K** reported in AIR 1972 SC 102 observed as follows:-

> "It may be remembered that the substantive evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. ... The identification during police investigation, it may be recalled, is not substantive evidence in law and it can only be used for corroborating or contradicting

> evidence of the witness concerned as given in court. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in court of the identifying witness."

24. However, in Ronny's case(supra) the Apex Court held that if the witness had an opportunity to interact with the accused and noticed his distinctive features, the court identification can be acted upon even in absence of corroborative evidence of test identification parade.

25. Bearing in mind the relevant law as to the identification, we proceed to deal with the case of individual accused person.

Munna Shah:-

In order to establish charge against A-1 Munna Shah the prosecution has examined the witnesses of occurrence namely P.W.1 Rakesh, P.W.12 Champaji, P.W.13 Mukesh and P.W.18 Ishwarlal. We have already referred to the evidence of all the four witnesses as to the participation of A-1 Munna Shah in the crime. The

crucial question which arises for consideration is as to identity. As per the statement of P.W.27 Vikram Singh the appellant A-1 Munna Shah was arrested vide Ex.P47 on 15.10.2003. P.W.25 Ashok Kumar Tak deposed that at the relevant time he was posted as Judicial Magistrate First Class, Pratapgarh. He deposed that on 1.11.2003 an application Ex.P17 was presented before him duly endorsed by the Chief Judicial Magistrate, Pratapgarh for arranging identification parade of the accused persons. Accordingly, he issued summons to the witnesses and the identification parade was arranged on 3.11.2003. He has given the details of identification parade. He also stated that he took all the necessary precautions in arranging the identification parade. The identification parade was arranged in two rows, first with Munna Shah another with Raju Yadav @ Iqbal. In both the rows seven persons were mixed up. He has proved the identification proceedings Ex.P7. P.W.1 Rakesh identified the accused appellant A-1 Munna Shah. P.W.16 Gopal Singh identified both the accused A-1 Munna Shah and A-2 Raju Yadav @ Iqbal. It may be stated that P.W.1 Rakesh is the witness of occurrence. He has been. A-1 Munna Shah was identified by the witnesses of occurrence i.e. P.W.1

Rakesh and P.W.18 Ishwarlal. He was also identified by P.W.16 Gopal Singh.

26. With respect to identification parade, it is submitted by Mr.Khan learned counsel for the appellant that the identification parade is a farce for the reason that at the first instance the appellant A-1 Munna Shah was admitted in the same Hospital where P.W.1 Rakesh was admitted. Thus, he had an opportunity to see the appellant. It is further submitted that the photographs of the appellants were published in the daily News Papers, as such the identification parade was a farce. The another criticism is that there is a delay in holding the identification parade inasmuch as while he was arrested on 15.10.2003 the parade was arranged as late as on 3.11.2003. On careful consideration of the contentions raised by the learned counsel, we are of the view that there is no substance in any of the contentions. As regards the first contention simply because the victim and the accused were admitted in the same hospital, cannot be a ground to discredit the identification proceedings. As regards flashing of the photographs in the News Papers, our attention has been invited to statement of D.W.1 Mahesh. He deposed that

he had read the News Paper wherein the photographs of accused persons had flashed. We have seen the News Papers produced during the trial. They are blurred. It is impossible to identify any of the accused persons from the photographs appeared in the News Papers.

27. Recently, we had an occasion to deal with an identical question in Narendra Yadav & Ors. Vs. State of Rajasthan (D.B.Criminal appeal No.523/2000) decided on 6.9.2006. The said case has been decided relying on a decision of Apex Court in D.Gopalakrishnan vs. Sadanand Naik reported in 2004 Cri.L.J.(SC) 4664. Suffice it to say that there is no suggestion to any of the witnesses of occurrence that they had seen the photographs of the accused persons appeared in the News Papers. Thus, the criticism does not survive. As regards the third contention, it is stated by P.W.27 Vikram Singh that request for identification could not be made earlier as the police party was dispatched for the arrest of other accused persons. He has also stated that during the entire period the appellant was kept Baparda. In our view there is no delay in conducting the identification parade. Thus, none of the criticism survives.

28. The another incriminating circumstance against appellant Munna Shah is that he was arrested red handed just after the incident vide Ex.P47. At the time of arrest he was found with a country made auto pistol and a bag of currency notes. As he had fallen on the ground, there were injuries on his person. On opening the country made auto pistol two 9 m.m. Cartridges, one live and another empty were found in the chamber. The country made auto pistol was seized and sealed separately vide Ex.P48 and Ex.P49 respectively. All the articles were sent to the Forensic Science Laboratory. It is not necessary to deal with the link evidence as the same has not been challenged. As per the FSL report Ex.P101 the seized 9 m.m. country made auto pistol was a serviceable fire arm. On examination of the barrel residue it was found that 9 m.m. country made auto pistol had been fired. On stereo and comparison microscopic examination, it was found that two 9 m.m. cartridges were fired from the 9 m.m. country made pistol. It may also be stated that during inspection of the site an empty cartridge and a bullet was found on the staircase of the Bank, which was seized vide Ex.P43. As per the FSL report Ex.P101 the said seized 9 m.m. cartridges were found to have been fired from the

recovered pistol. Thus, the evidence of recovery of country made auto pistol cartridges is the incriminating circumstance against the appellant pointing towards the guilt. The another significant incriminating circumstance is recovery of currency notes vide Ex.P51. At the time of arrest the appellant Munna Shah found with a bag of currency notes worth Rs.8,44,850/-. There is no explanation as to how he came in possession of such a huge amount. This incriminating circumstance positively points towards the guilt of the appellant. Thus, there is overwhelming evidence against appellant Munna Shah to establish the charge of robbery and murder. The trial court has rightly convicted him of the said offences.

RAJU @ IQBAL AND MUNNA @ DILIP:-

29. As regards the appellant Raju @ Iqubal it is not in dispute that he was not identified in the identification parade. In the court he has been identified only by P.W.18 Ishwar Lal. The manner in which the incident has taken place, the witness could have only a flitting glimpse and as such it is not safe to uphold his conviction solely on the basis of the court identification. There is another incriminating circumstance against him

i.e. recovery of currency notes. In pursuance of the information given by him vide Ex.P96 the currency notes of Rs.2000/- were recovered vide Ex.P58. This part of the evidence on face appears to be fabricated. As per the prosecution case the appellant Munna Shah was arrested immediately after the incident i.e. almost red handed. At that time he was carrying with him the bag of currency notes, which he had snatched from Rakesh and the pistol. Thus, there was no occasion for him to part with the money. Thus, it is doubtful that the recovered money is the same which was robbed from Rakesh.

30. Similarly in the case of Munna @ Dilip there is only evidence of identification of P.W.18 Ishwar Lal i.e. court identification. There is no evidence to connect the appellant Munna @ Dilip with the alleged crime. It emerges from the evidence that in case of Raju @ Iqbal the identification was arranged in two lines and the witnesses were not told that they were also to identify the person, who was sitting on the driving seat of the motorcycle. The identification parade was not at all arranged for Munna @ Dilip. In these circumstances the benefit of the regrettable lapse of not properly

arranging the identification for Raju @ Iqbal or non-holding of test identification for Munna @ Dilip goes to both the appellants. There is no creditable evidence on record to connect both the appellants with the alleged crime.

STATE APPEAL:-

31. As far as State appeal against the order acquitting the respondent Kalu is concerned, the learned Public Prosecutor has failed to point out any creditable evidence to connect him with the alleged robbery and murder. The only case against him is that he used to visit the Hotel Ambika. It is admitted that he is a vegetable seller. He used to regularly supply vegetables in the Hotel. Thus, there is nothing unusual against him to connect him with the crime. Thus, we are of the view that the trial court has rightly acquitted him of the charges levelled against him. No interference is warranted with the order of acquittal passed by the trial court.

32. Turning to the sentence, it is well established that as to whether the case is one of the rarest of rare cases

is a question which has to be determined on the facts of each case. Suffice it to mention that the choice of the death sentence has to be made only in the rarest of the rare cases and that were culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and where the crime is committed in an organised manner and is gruesome, cold-blooded, heinous and atrocious. Undoubtedly in the instant case brutality is involved but that brutality by itself does not bring it within the ambit of rarest of rare cases. Having regard to the nature of offence and the methodology adopted, we are convinced that the punishment awarded to the appellant Munna Shah herein is in excess of the requirement of the situation. It would serve the ends of justice if the capital punishment is commuted into imprisonment for life.

33. In view of the aforesaid discussion, the murder reference and the appeals are disposed of as follows:-

(1) **D.B.Criminal Murder Reference No.3/2006:-** The reference made by the trial court is rejected. The death sentence awarded

to appellant Munna Shah is commuted to imprisonment for life. The sentences awarded on all other counts shall remain intact.

(2) **D.B.Criminal Appeal No.607/2006 & D.B.Criminal Jail Appeal No.608/2006 filed by Munna Shah**:- Both the appeals stand dismissed except as modified on the point of sentence. The appellant Munna Shah is in Jail. He will serve out the remaining part of the sentence.

(3) **D.B.Criminal Appeal No.638/2006 and D.B.Criminal Appeal No.639/2006:-** The appeals filed by Munna @ Dilip and Raju @ Iqbal are allowed. They are acquitted of the charges levelled against them. They are in Jail. They shall be released forthwith, if not required in any other case.

(4) **D.B.Criminal Leave to Appeal No.270/2006:-** The State Appeal stands dismissed.

(R.P. VYAS), J. **(N.N.MATHUR), J.**

BKS/-